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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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9 MITCHELL ENGINEERING,

No. C 08-04022 SI

10 Plaintiff,

v.
11 NOTICE TO COUNSEL RE
12 et al.,
13 Defendant.

14 Having reviewed the evidence presented at trial and the instructions presented by the parties, the
15 Court has concluded that it should not instruct separately on the question of procedural due process.
16 Plaintiff's claim is that defendants' termination of plaintiff's Central Pump contract was done in
17 deliberate retaliation for plaintiff's First Amendment activities. Plaintiff contends that the termination
18 had the consequence both of ending the contract and of effectively debarring him from public
19 contracting in San Francisco, by operation of the newly-enacted prequalification ordinances.
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21 It has neither been asserted nor proved that the prequalification ordinance was improperly
22 enacted, or that such ordinances, in the abstract, violate any procedural due process requirements.
23 Rather, plaintiff's theory has been that the existence of the ordinance exacerbated the consequences of
24 the allegedly retaliatory contract termination.

25 Neither plaintiff nor defendant has provided the Court with any coherent instruction governing
26 the procedural due process claims, and this appears to be because the claim is better subsumed under
27 the general retaliation rubric. If defendants were not acting in retaliation, as plaintiff contends, then any
28 collateral due process claim would fail; conversely, if defendants did act in retaliation, plaintiff would

1 be free to claim damages related to the constructive debarment theory.

2 The Court will discuss this matter with counsel at the instruction conference tomorrow.

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4 Dated: September 27, 2010

Susan Illston

5 SUSAN ILLSTON
6 United States District Judge